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IN THE

Supreme Court of The United States

OCTOBER TERM, 1965

No. 199

GABRIEL DIAZ, RAY BAKER, JOHN FANNON AND RONALD VINCENT PECCIA,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF ON BEHALF OF PETITIONERS

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MAY IT PLEASE THE COURT:

In its opposition brief the Government seeks to minimize the impact of its highly improper conduct in falsely attributing to Diaz the use of an alias by stating: (Government Opposition Brief, page 5)

> There was thus no attempt to insinuate *that Diaz had personally used an alias*, but the testimony did establish that Cohen used some name other than Diaz in initially referring to Diaz." (Emphasis added)

The foregoing contention that there was no attempt to suggest that Diaz had personally used an alias is

flatly contradicted numerous times on the face of the record. The government's misuse of this supposed alias testimony commences at page 180 of the record where we find the Government witness Heyman stating that:

> " "Mr. Cohen called me and said *he had a client whose name was Edouardo Menendez*" adding that he had tax problems and was a political refugee from Cuba. (R. 180)

Government witness Heyman then proceeded to identify the supposed Menendez as Diaz. Thus: (R. 181)

> "Q. Did you ever meet this Eduoardo Menendez?
> A. Eventually I met him in Mr. Cohen's office."

Heyman added that this occurred the next day (R. 181)

Three pages later, we find the prosecution continuing to use this counterfeit alias as follows: (R. 183)

> Q. Do you see in the courtroom this Menendez that you say you met?
> A. Yes, sir, I do.
> Q. Would you point him out to the Court and the jury?
> A. He is that gentleman sitting there with the gray hair and it looks like a blue suit," etc. * * *

Mr. Paisley: LET THE RECORD SHOW HE HAS IDENTIFIED THE DEFENDANT, DIAZ"

It is true that the said Government witness, Heyman, on cross examination, retracted the above testimony in which he identified Diaz as having posed as Menendez. Thus: (R. 226)

> "Q. Now, is it not a fact that in Miami where you say you contacted him after you got to Miami, that he was registered at the Sands Motel under the name of Gabriel Diaz or G. Diaz?
> A. That is correct.
> Q. *Then insofar as you know, has he ever used any other name than the name of G. Diaz?*
> A. *No, he hasn't.*"

However, long after Heyman had admitted that Diaz had never posed as Menendez or anyone else, THE GOVERNMENT PERSISTED IN USING EVIDENCE TENDING TO SHOW THAT DIAZ WAS POSING AS MENENDEZ. The above recantation by Heyman occurred at a relatively early phase of the case, at page 226 of the record, quoted above. Long after that, at page 687 of the record, we find the Government still slugging away with the false testimony as to the supposed use of an alias by Diaz. Thus we find FBI Agent Lenihan being used to relate *portions* of a statement by the defendant Cohen in which the alias insinuation is used anew. Lenihan testified: (R. 687)

> "A. We interviewed Mr. Cohen about mid morning on January 13th and he introduced himself as an attorney who had an office in his practice of law in New Orleans, and I told him that as an attorney

> he realized he did not have to make any statements, and any statement he might make could be used in Court, and he said that he realized that. He mentioned that about November or December, 1960, he had received a telephone call at his New Orleans office from a man who said his name was Eduardo Menendez. He subsequently had a couple of personal interviews with Menendez at his office and Menendez related that he was a Cuban refugee who had once been a millionaire but was now an exile in the United States, and he did have some assets that were composed of, among other things, some Shell Union Oil bonds of $1,000 denomination."

Thus, long after the Heyman testimony about the alias had been exploded, as shown above, we have the Government offering more of the same, in the form of an alleged statement by the defendant Cohen, in which he treats Diaz and Menendez as the same person. Lenihan continued to give more of such testimony: (R. 688)

> "Mr. Cohen mentioned that Mr. Menendez gave him $500.00 as expenses in trying to find a source of money to sell them (the bonds) or borrow money on them. And about a week before Christmas, 1960, Mr. Cohen said that he and Mr. Menendez made a trip from New Orleans to Miami where they stayed at the Airport Hotel."

The relation of the above events, such as the furnishing of money and the trip, had been clearly established by several other witnesses. Thus, the insertion of the name Menendez as being the party involved, rather than Diaz, was clearly an attempt by the Government to "sell" the jury the idea that Diaz was using an alias, despite the fact that the initial Government witness on this point, Heyman, had long since retracted his first testimony on that score.

Moreover, in his subsequent testimony in which he continued to relate what the defendant Cohen had told him, FBI Agent Lenihan, quoted Cohen *five additional times as describing Menendez for Diaz.* (R. 689, 690 and 691)

To cap the climax, he threw in for good measure a thoroughly confusing statement attributed to Cohen. Agent Lenihan testified: (R. 690)

> "Cohen mentioned that Menendez registered at the hotel as G. Diaz and also travelled under the name of G. Diaz."

All of the above testimony of FBI Agent Lenihan had been objected to initially by the defense, of course, because it was based on statements made by Cohen to said agent on January 13, 1960, well after the date of the last substantive offense. (R. 685) Moreover, even though January 13 was within the term of the conspiracy pleaded in the indictment, February 1, 1960, the Government had conclusively proven by its own evidence that the whole affair was terminated before January 13, 1960, because on that date the FBI agents were actually picking up the last of the bonds involved

in the case. *Thus, all of the above testimony was erroneously admitted anyway, being made by a co-defendant after the termination of the conspiracy.* The admission of this testimony of Lenihan, relating the statements above attributed to Cohen, were repeatedly objected to and were made the basis of Specification of Error Number Two before the Fifth Circuit Court of Appeals.

The point we focus upon here, however, is that, by continuing to put forward evidence that Diaz had used an alias, long after its principal witness on that point had retracted his testimony, as shown above, the Government was guilty of bad faith.

But the attempt to mislead the jury into the belief that Diaz had used the alias of Menendez did not terminate with the testimony of Agent Lenihan. Still another FBI Agent, Mr. Prospere, was put on the stand, to drag in more prejudicial statements attributed to Cohen regarding the alias. Agent Prospere, referring to what Cohen told him, testified: (R. 698)

> "He stated that he had flown to Miami, Florida, in December 1960 with Lewis Marder *and an individual called Menendez that he later identified from a photograph as Gabriel Diaz" etc.*

Agent Prospere, in his subsequent three pages of testimony, proceeds to use "Menendez" interchangeably with "Diaz" *three times,* in describing what Cohen told him. (R. 698 through 700)

From all of the foregoing it appears clearly ridiculous to suggest, as the Government does in its brief, that there was no attempt to insinuate that Diaz himself used an alias. Nor can the government plead that it was in good faith in putting forth Heyman's initial testimony about the supposed use of an alias. For, long after Heyman had admitted the falsity of his initial testimony as to Diaz having supposedly used an alias, the Government deliberately continued to put forth rank hearsay evidence, to the same effect.

In a case where the principal defense was lack of guilty knowledge as to the actual nature of the bonds, the use of an alias by Diaz would, of course, have been a glaring badge of fraud. Moreover, through his association or contacts with the other defendants, this badge of fraud was one which would obviously been pinned to all of the defendants.

We submit that the principle expressed in the Read case, quoted in our petition for certiorari, is controlling here:

> "The government cannot afford to convict its citizens by unfair means."

The Fifth Circuit, in its opinion below, was completely silent on this point, despite the fact that it was vigorously presented and developed, particularly in the application for rehearing. (R. 795 through 807) In its opposition brief, as we have noted, the Government seeks to evade the impact of its grossly improper conduct by blandly ignoring what the record sets forth in black and white.

At a minimum, therefore, we submit that petitioners are entitled to at least some expression from this Court as to how the conduct of the Government in the trial of this case can be justified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, G. W. Gill, attorney for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing "Reply Brief" upon the Solicitor General of the United States and upon the United States Attorney for the Southern District of Florida, by mail, postage prepaid, addressed to their respective offices.

New Orleans, La., September , 1965.

G. WRAY GILL, SR.